# STATE OF MICHIGAN

# COURT OF APPEALS

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| LAWRENCE G. MADAY and CHERYL A. MADAY,<br><br>Plaintiffs-Appellants-Cross-Appellees, | UNPUBLISHED<br>December 16, 2008 |
| v<br><br>HAROLD I. MILLER REAL ESTATE DEVELOPMENT & LEASING and HAROLD I. MILLER,<br><br>Defendants-Appellees-Cross-Appellants. | No. 278236<br>Bay Circuit Court<br>LC No. 03-003205-CH |

Before: Schuette, P.J., and Zahra and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as on leave granted the October 6, 2004 judgment and the January 9, 2006 opinion and order awarding defendants case-evaluation sanctions issued by the trial court. Defendants cross-appeal, challenging the trial court's September 3, 2003 order granting in part and denying in part defendants' motion for summary disposition, as well as its August 4, 2005 order awarding plaintiffs costs and attorney fees. We affirm in part, reverse in part, and remand for a new trial.

## I. FACTS

Plaintiffs are home purchasers who brought this action for defective construction of a home against defendants. In November 2001, plaintiffs purchased their home from defendants with an addendum. The purchase agreement stated: "An inspection of the premises will be obtained by the Buyer, at Buyer's expense. If inspection is acceptable to Buyer, Buyer agrees to accept property in its present 'AS IS' condition with no warranties expressed or implied from the Seller and/or agent." The addendum was a one-year builder's limited warranty. Plaintiffs assert that they were not given this separate warranty document at closing. Defendant Harold Miller was not at the closing and testified he could not be certain whether plaintiffs received the addendum; however, it was the company's protocol to provide such a document.

Soon after their purchase, plaintiffs had difficulties with the house. Such problems included: the doors being out of plumb, drafty windows, and lack of insulation. Plaintiffs attempted to contact Mr. Miller, but communication proved unsuccessful.

Plaintiff, Lawrence Maday, began remedying the problems by making repairs and recording his repair expenditures. This record of costs became the basis for the damages award at trial. Mr. Maday had worked for a construction contractor for 22 years; however, there were some problems he could not fix. In particular, there was a crack in the north wall of the basement that was growing wider and causing leakage when it rained. There was also a crack in the southwest corner where the sump line moved water away from the foundation.

Plaintiffs sought relief from the state Bureau of Commercial Services Enforcement (the Bureau). In particular, plaintiffs filed a "Statement of Complaint" with the Bureau. Richard Sabias, an official from the Bureau, inspected the house and also issued a report with a list of code violations. Sabias found several problems with the house, including the following: improper attic venting; the landing at the bottom of the basement stairs was not the proper dimension; the stair risers on the concrete pre-cast steps leading from the garage into the house were not equally spaced; and the egress well for the basement egress window was over 44 inches in depth, thus requiring a ladder, which was not provided.

After this, the Bureau sent Mr. Miller a letter on November 18, 2002, allowing him 60 days to repair the problems and requiring plaintiffs to make the property accessible for repairs. On April 1, 2003, Mr. Miller responded to plaintiffs' complaint by writing a letter to the Bureau stating: "The amount the Madays are asking for is outrageous. Any of the four violations the building code inspector states needs to be re-corrected will be done by my company at our expense. However, the building inspector stated these items were all borderline violations and that they were accepted 'as is.'" The Bureau issued a formal complaint against Mr. Miller that specifically referenced plaintiffs' complaint.

Plaintiffs filed suit against defendants on March 20, 2003. Plaintiffs alleged that defendants: (1) breached the contract; (2) breached express and implied warranties; (3) negligently constructed the home; (4) breached their fiduciary duty; and (5) violated the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*.

On June 30, 2003, the trial court issued a pretrial order, requiring all lay witnesses to be listed by August 15, 2003, plaintiffs' experts to be listed by August 15, 2003, and defendants' experts to be listed by August 29, 2003. The order allowed for additional witnesses if the court found good cause. While both parties timely filed their lay witness lists, neither filed a witness list for experts. The order also allowed discovery through December 21, 2003, and set trial initially for January 21, 2004.

On August 4, 2003, defendants moved for summary disposition under MCR 2.116(C)(8) & (10), asserting, among other things,[1] that they were entitled to dismissal of plaintiffs'

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[1] Defendants challenged all six counts of plaintiffs' complaints. However, only one of
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negligence claim because plaintiffs failed to allege a duty that was independent of the parties' contractual undertakings. Plaintiffs opposed the motion. The trial court heard oral arguments on August 28, 2003, and denied defendants' motion as to all but one of plaintiffs' claims; it dismissed plaintiffs' claim for breach of fiduciary duty.

On December 23, 2003, defendants moved for summary disposition under MCR 2.116 (C)(9), arguing that they were not given sufficient opportunity to try to make repairs and that there was a breach of warranty or failure to mitigate damages. Plaintiffs responded by arguing that there was opportunity to make repairs and the repairs defendants did make were grossly insufficient.

At case evaluation on January 7, 2004, and in plaintiffs' answers to interrogatories dated December 19, 2003, plaintiffs identified the following expert witnesses: Mr. Superzinski and Mr. Borden. Discovery closed on January 19, 2004. On February 5, 2004, defendants moved to strike plaintiffs' expert witnesses. Plaintiffs opposed defendants' motion and filed an updated witness list on February 9, 2004.

The trial court heard oral arguments on the motions for amendment of plaintiffs' witness list and defendants' motion for summary disposition regarding the right to repair on February 11, 2004. The trial court denied defendants' motion for summary disposition. However, the court held that defendants had a right to an opportunity to repair the home, and thus ordered plaintiffs to allow defendants' subcontractor into their basement. The court enjoined plaintiffs from doing any further basement repair themselves. Trial was adjourned until after June 1, 2004.

The trial court also denied plaintiffs' proposed updated witness list and struck plaintiffs' expert witness because discovery had already ended and defendants would be prejudiced by the late addition. However, the trial court also reserved the right to appoint a court-appointed expert. Later, the trial court retracted this offer. At this same hearing, the trial court provided defendants with an additional 30 days to respond to interrogatories that were served in the previous December.

The trial court further held an off-the-record conversation that was later put on the record at plaintiffs' request. The conversation entailed the trial judge suggesting to plaintiffs that they hire an expert, Larry Van Wert, to examine the basement. The trial judge suggested that if the plaintiffs hired such an expert, the court would allow Van Wert to testify.[2]

After this conversation, plaintiffs hired Van Wert. Van Wert inspected the home and produced a report that was generally favorable to plaintiffs' case. On June 8, 2004, plaintiffs again moved to amend their witness list and re-open discovery to add expert Larry VanWert. Defendants opposed the motion. The trial court heard oral arguments on June 29, 2004, and denied plaintiffs' motion.

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defendants' arguments is relevant to this appeal.

[2] Plaintiffs assert that the trial judge indicated the purpose of hiring Van Wert was to allow Van Wert to testify, while the trial judge later indicated the purpose of hiring Van Wert was to help the parties settle the case.

Defendants moved for summary disposition twice more. Plaintiffs also moved from summary disposition under MCR 2.116(C)(10). The trial court denied the motions, concluding that whether plaintiffs' refusal to allow defendants to repair constituted a failure to mitigate damages was a fact issue that must go to trial. The court also ruled that the absence of experts for the plaintiffs did not preclude the possibility that plaintiffs could prove their prima facie case.

On August 16, 2004, plaintiffs moved again to add Van Wert and Zervan as expert witnesses. The trial court refused to entertain the motion.

At trial, plaintiffs called all the witnesses, including the plaintiffs, Richard Sabias, Steven Gobbo (an attorney with the Bureau of Commercial Enforcement), Harold Miller, and James Kozlowski (a mason who constructed the foundation of the house). Plaintiffs used their testimony, as well as the testimony of Richard Sabias, to establish defects and the required repairs. The trial court found that Sabias was an expert only on a limited basis: as to the defects he observed. Sabias testified to the four violations he observed; however, the trial court did not permit him to testify about the potential danger from the basement wall cracks. Further, the trial court did not permit Sabias to testify about the appropriate remedies for the basement problems.

The trial court also ruled that plaintiff Lawrence Maday was not an expert, although he had experience in the construction industry. The trial court allowed Maday to testify to what he observed, but did not allow him to testify as to how to fix the problems and the costs of such repair. Maday was further prohibited from testifying to his own expenditures for the basement work and to the observation that the basement wall leaking stopped after certain work was completed. Mr. Maday did testify about the repair work on problems besides the basement, such as the insulation and doors. Mr. Maday completed these repairs himself and testified to the time required to complete the work as well as the costs of the materials.

After the trial court heard the testimony, defendants moved for a directed verdict. The trial court granted defendants' motion on all counts against Harold Miller individually. The court reasoned that defendant Harold Miler was not personally liable under either the contract or for negligence in construction. The jury then found the defendant corporation liable for negligent construction and violation of the MCPA, but not for breach of contract or warranty. The jury awarded $4,625 in damages.

On February 24, 2005, the trial court ruled that the MCPA fees were not to be included in the adjusted verdict for purposes of case-evaluation sanctions. The court then awarded plaintiffs $33,190 in MCPA attorney fees. The trial court's adjusted verdict was $5,284.02 to plaintiffs. This amount included the jury verdict, as well as interest and costs.

On January 9, 2006, the court entered an award of case-evaluation sanction[3] against plaintiffs in the amount of $42,276.00.

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[3] The trial court's adjusted verdict was $5,284.02 to plaintiffs. The case evaluation hearing resulted in a unanimous $6,000 award, which plaintiff rejected. Therefore, the trial court held that defendant corporation was entitled to case-evaluation sanctions.

Plaintiffs appealed to this Court four times: three times as an appeal of right and once as a delayed application for leave. All of plaintiffs' appeals were dismissed. However, plaintiffs appealed this Court's dismissal to our Supreme Court, who then remanded this case for consideration as on leave granted. *Maday v Harold I Miller Real Estate Dev & Leasing*, 478 Mich 865; 731 NW2d 739 (2007).

## II. SUMMARY DISPOSITION

Defendants argue that the trial court erred in denying, in part, their motion for summary disposition. We disagree.

### A. Standard of Review

We review de novo a trial court's decision on a motion for summary disposition. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). "A motion for summary disposition brought [under] MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the allegations of the pleadings alone." *Id*.

### B. Analysis

Defendants assert that they were entitled to dismissal of plaintiffs' negligence claim because plaintiffs failed to allege a duty that was separate and distinct from the duties assumed under the parties' contract. They refer this Court to *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004), to support their argument. However, defendants' reliance on *Fultz* is misplaced. In *Fultz*, our Supreme Court explained that "'accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract.'" *Id*. at 465 (citation omitted). The *Fultz* Court held that for a *third party* to maintain a negligence suit based on a defendant's common-law duty to perform his contractual duties with reasonable care, this Court must first find that the "defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations." *Id*. at 467.

Indeed, the *Fultz* Court stated that "[t]he threshold question for negligence claims brought against a contractor on the basis of a maintenance contract between a premises owner and that contractor is whether the contractor breached a duty *separate and distinct from those* [*duties*] *assumed under the contract*." *Id*. at 461-462 (emphasis added). Therefore, if there is no independent duty owed to a plaintiff, there can be no tort action based on the contract. *Id*. at 467. "[A] tort action will not lie when based solely on the nonperformance of a contractual duty." *Id*. at 466. However, our Supreme Court has also clarified that *Fultz* is not applicable to parties to the contract. *Garrett v Sam H Goodman Building Co*, 474 Mich 948; 706 NW2d 202 (2005) (concluding that this Court erred in applying *Fultz* to the defendant "because [defendant] and plaintiff were in contractual privity.").

Here, plaintiffs and defendants are parties to the contract. Therefore, plaintiffs were not required to allege a duty that was separate and distinct from those duties assumed under the contract, and the trial court did not err in denying defendants' motion for summary disposition on those grounds.[4]

## III. AMENDMENT OF PLAINTIFFS' EXPERT WITNESS LIST

Plaintiffs first argue that the trial court abused its discretion by striking their expert witnesses and refusing to allow them to add experts to their witness list. We disagree.

### A. Standard of Review

We review a trial court's decision to strike a witness as a discovery sanction for an abuse of discretion. *Local Area Watch v Grand Rapids*, 262 Mich App 136, 147; 683 NW2d 745 (2004). Likewise, "[t]he decision whether to allow a party to add an expert witness is within the discretion of the trial court." *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991). An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

### B. Analysis

The pre-trial order required plaintiffs to file their lay and expert witness lists by August 15, 2003. On August 20, 2003, plaintiffs filed their "preliminary witness list," naming no experts. However, at case evaluation on January 7, 2004, and in plaintiffs' answers to interrogatories dated December 19, 2003, plaintiffs' experts, Mr. Superzinski and Mr. Borden, were identified. Discovery closed on January 19, 2004. On February 5, 2004, defendants moved to strike plaintiffs' experts witnesses. Plaintiffs opposed defendants' motion and filed an updated witness list on February 9, 2004. The trial court heard oral arguments on February 11, 2004, and granted defendants' motion, reasoning as follows:

> This Court finds and holds that defendants will experience undue [sic] and [will be] highly prejudiced in allowing plaintiffs' newly-named witnesses to testify because said witnesses were not properly named within the discovery period. To allow plaintiff now to list these new expert witnesses, being Mr. Super[zinski], Mr. Borden, and Mr. Zervan, all three witnesses, in effect, would be starting discovery all over again.
>
> No interrogatories were directed to these new plaintiffs' experts and no depositions have been taken of these experts by defendants' counsel because they

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[4] We note that the trial court denied summary disposition for a different reason. However, "'[a] trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason.'" *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005), quoting *Gleason v Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

were not listed as witnesses, much less expert witnesses, on plaintiffs' witness list, which was due I believe on August the 15th, 2003. Further discovery had been extended and plaintiffs still did not amend their witness list until all discovery ended. If this Court allowed the naming of these new plaintiffs' experts, it would re-open all discovery. No doubt defendants' attorney would then ask to add additional experts to counter plaintiffs' new expert witnesses. Interrogatories and depositions of four or more new expert witnesses would then result. This is exactly the reason why the Court issues a pretrial order with specific dates.

The Court finds that plaintiffs waited in the weeds until trial was looming before amending their witness list. Furthermore, there is absolutely no rationale and/or good faith reason why these witnesses could not and should not have been listed by August the 15th, 2003, the witness cut-off date.

In fact, in reviewing defendants' – or excuse me – plaintiffs' response, they had attached as exhibit D to plaintiffs' answers to defendants' motion for summary disposition a proposal from Zervan Construction Company. The Court notes that this was dated August the 12th, 2003, prior to the listing of the cut-off date for plaintiffs' experts.

As indicated instead, plaintiffs waited until after discovery was closed and the trial was looming to add these expert witnesses. Then, instead of plaintiff filing a motion with the Court requesting to amend their witness list, plaintiffs just filed an amended witness list.

Further, case evaluation took place January the 7th, 2004. The adding of plaintiffs' new expert witnesses would result in case evaluation being nothing but a sham and useless.

Lastly, allowing plaintiff (sic) to add these expert witnesses after discovery ended and after case evaluation was conducted would interfere with the Court's scheduling and the administration of justice.

For all the reasons stated, the Court is striking Stephen Zervan, Robert Borden, and Mr. Super[zinksi] as expert witnesses of plaintiffs. These expert witnesses were listed on plaintiffs' updated witness list. Two of them were I think on . . . February 9th, 2004.

On June 8, 2004, plaintiffs again moved to amend their witness and re-open discovery to add expert Larry VanWert. Defendants opposed the motion. The trial court heard oral arguments on June 28, 2004, and denied plaintiffs' motion, reasoning as follows:

By adding this expert witness at this time, it would be very prejudicial to the defendant and, quite frankly, is violative of the rules of administration of justice in moving the Court's docket. And the Court is denying the request to add Mr. VanWert as an expert witness.

A trial court may preclude a party from introducing expert testimony at trial as a sanction for failing to comply with a discovery order. MCR 2.313(B)(2)(b); *LaCourse v Gupta*, 181 Mich App 293, 296; 448 NW2d 827 (1989). However, "the mere fact that a witness list was not timely filed does not, in and of itself, justify the imposition" of such a sanction. *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). A trial court should consider the following non-exhaustive list of factors to determine an appropriate discovery sanction:

> (1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the defendant; (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect; and (8) whether a lesser sanction would better serve the interests of justice. [*Id*. 32-33.]

Here, the trial court did not abuse its discretion in refusing to allow plaintiffs to amend their witness list to add expert witnesses. The trial court relied on the following factors to impose the discovery sanction in this case: (1) (the willful nature of the delay) and (3) prejudice to defendants by the attempted amendment after discovery had closed. As to the willful nature of the delay, the trial court found that plaintiffs "waited in the weeds until trial was looming" to amend their witness list. As to the prejudice to defendants by adding the expert witnesses, the trial court stated that it was concerned that discovery would have to be reopened and the case would be further delayed. In addition, the trial court found that granting plaintiff's motion would "interfere with the Courts schedule and the administration of justice."

The trial court weighed the relevant factors and gave a detailed explanation for its decision. Therefore, we find no abuse of discretion.

## IV. ADMISSIBILITY OF LAWRENCE MADAY'S TESTIMONY

Plaintiffs also argue that the trial court abused its discretion when it refused to allow plaintiff, Lawrence Maday, to testify about the cost of the repair work he paid for. We agree.

### A. Standard of Review

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004).

### B. Analysis

Plaintiffs attempted to admit testimony from Lawrence Maday about the repairs to the basement and how much he paid for them. The trial court refused to allow his testimony, concluding that it was hearsay and could not be admitted without expert testimony that the amounts paid were reasonable. The following exchange occurred out of the jury's presence:

MR. RUSCH: Okay. And how does it affect his ability to give an opinion of what the alleged problems with the wall were caused by, how to fix them, or what it would cost, 'cause those are certainly outside the scope of a lay opinion?

THE COURT: That would be correct, Mr. Rusch. He can testify to what he saw and what he thinks is wrong with it. There's nothing here that shows that he's capable of forming opinion about how to fix it and the cost.

MR. RUSCH: Thank you.

MR. GAYTON: Your Honor, just to follow up that question, he can testify to what he's paid, though?

MR. RUSCH: No, 'cause that's hearsay within hearsay.

THE COURT: That's hearsay.

MR. GAYTON: How much he paid?

THE COURT: Correct. How do—

MR. GAYTON: A payment's not hearsay.

THE COURT: How is Mr. Rusch gonna cross-examine a person that—

MR. RUSCH: Is it reasonable, is it customary?

THE COURT: -- charged? . . . I never drive my wife's car. And, unfortunately, I drive it one day, I can't remember why I drove it, and I run into m--one of my employees in the parking lot. And she's got one of these older cars with the big chrome bumpers. And my wife's car's got that plastic bumper and it looked like the bumper popped out a little bit and had to be painted, you know. And I looked at it and I thought, jeez, it's three, four hundred bucks. Nineteen hundred dollars later, my car—my wife's car looks pretty good. And, so, that's the problem, Mr. Gayton. I don't know whether Mr. Maday and Mr. Rusch doesn't know whether Mr. Maday paid the proper price for something, whether underpriced or overpriced.

MR. GAYTON: Well, sorta—that'd be cross-examination

THE COURT: It's hearsay.

MR. GAYTON: A—a—the payment that he made is not hearsay.

MR. RUSCH: It's hearsay.

THE COURT: It certainly is.

MR. RUSCH: It's hearsay within hearsay in that he's offering as—that he paid it and that's outside of the Court and the fact that it—the proper charge for that work was that amount is hearsay.

MR. GAYTON: Well, whether it was proper or not, I think we—we can argue about. But the Court just said he could testify what's wrong—what he thinks . . . is wrong and he can also testify this is—

THE COURT: Well, Mr.—the—the—

MR. RUSCH: Based on what he sees.

THE COURT: --the closet rod fell off the—the wall. Well, if—if he says he went to Home Depot and he bought the new . . . bolts that should've been in there to begin with and they were $5.00 for each side and that's what he paid, I'll allow that because that's what he did. Now, if he says some guy came in and charged him fifty bucks to fix that, that's hearsay. He can testify that some guy came in but he can't testify to what the guy charged him.

MR. GAYTON: I—I'm not saying—but he can testify I put $1,500 out of my wallet, I paid it to somebody.

THE COURT: Hearsay because Mr. Rusch cannot testify—cannot cross-examine that person to see if that charge was reasonable.

Plaintiffs went on to argue for admission of an invoice from Stephen Zervan in the amount of $10,200 for repairs on the north wall of the basement and a cancelled check in the amount of $1,500 for the hydroseeding of plaintiffs' yard. The trial court rejected the admission of both of these documents.

Hearsay "is a statement [oral or written], other than the one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801. Here, the invoice and cancelled check were inadmissible hearsay. The invoice was created by an individual other than defendant, and it was being offered to prove the truth of the matter asserted, i.e., the cost of the repairs. The cancelled check, while created by plaintiffs, was also an out-of-court statement, being offered to prove the truth of the matter asserted, i.e., how much was paid for the repairs. These documents do not fit within any of the recognized hearsay exceptions, MRE 803; therefore, they were inadmissible hearsay, and the trial court did not abuse its discretion in refusing to admit this evidence at trial.

However, the trial court did abuse its discretion in refusing to allow Lawrence Maday to testify about the amount he paid for the repairs. It was not hearsay, and it was based on his personal knowledge. See MRE 602. By refusing to admit this testimony, plaintiffs were precluded from presenting to the jury $11,700 in damages. Therefore, the trial court's error was not harmless, its decision must be reversed, and the case remanded for a new trial.

In light of our conclusion, we need not address plaintiffs' argument regarding the trial court's grant of directed verdict in favor of Harold Miller. Further, because we remand for a new trial, we must vacate the trial court's award of case-evaluation sanctions to defendants and its award of attorney fees to plaintiff under the MCPA.

We affirm the trial court's denial, in part, of defendants' motion for summary disposition. We reverse its decision regarding the admissibility of Lawrence Maday's testimony and remand for a new trial. We also vacate the judgment entered by the trial court on October 6, 2004, its award of case-evaluation sanctions to defendants, and its award of attorney fees to plaintiffs under the MCPA. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Donald S. Owens